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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~1117~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented for Review	2
Statutes and Rules Involved	4
Statement of the Case	4
Reasons for Granting the Writ	
I. This Court Has Jurisdiction by a Writ of Certiorari to Review a Decision of the Court Below Which Attempts to Reverse This Court's Decision by Granting a New Trial, a Rehearing or Review of the Canadian Damage Findings and Permitting a New Defense on the Merits To Be Introduced at a New Trial	8
II. This Court Granted No Authority to the Court Below to Vacate the April 5, 1965 Judgment by Granting a New Trial or to Limit Petitioner's Damage Proofs to Damages Flowing from the June 5, 1959 Letter	15
III. Since the Government Suit Against General Electric Named Hazeltine as a Co-Conspirator the Holding of the Court Below That the Statute of Limitations Could Not Be Tolled Presents Not Only a Question of Great Public Importance in the Enforcement of the Antitrust Laws but a Conflict With the Decisions of Other Courts of Appeals as Well	18
IV. There Is No Provision in the Federal Antitrust Laws Limiting Petitioner's Recovery to Individual Acts Thus Excluding Damage Proofs of the Comparison of a Business Result in an Open Market as Compared With an Illegally Restricted Market	20
V. Since This Court Refused to Remand the Issue of a New Trial the Court Below Had No Jurisdiction to Grant a New Trial on the Canadian Damage Issue	24
Conclusion	25

Table of Citations.

Cases.

Bigelow v. RKO Radio Pictures, 327 U. S. 251 (1946) 22, 23

Briggs v. Pennsylvania R. Co., 334 U. S. 304 (1948) .. 25

Charm Tred Mills v. Erle P. Halliburton, Inc., 202 F. 2d 294 (7th Circuit, 1953) 10

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580 (1911) 24

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 (1927) 21

Hardy Salt Co. v. State of Illinois, 377 F. 2d 768 ..... 3, 20

Helvering v. Gowran, 302 U. S. 238 (1938) 10

In Re Potts, 166 U. S. 263 (1897) 16

In Re Sanford Fork & Tool Co., 160 U. S. 247 (1895) .. 8

Leh v. General Petroleum Corp., 382 U. S. 554 (1963) 20

Milwaukee Towne Corp. v. Loew's Inc., 190 F. 2d 561 (7th Circuit, 1951) 14

Minnesota Mining v. New Jersey Wood F. Co., 381 U. S. 311 (1965) 20

Perkins v. Standard Oil Co., 23 L. Ed. 599 (1969) 25

Roe v. Sears, Roebuck & Co., 132 F. 2d 829 (Seventh Circuit, 1943) 10

State of New Jersey v. Morton Salt Co., 387 F. 2d 94 .. 3, 20

Stinebower v. Scala, 331 F. 2d 366 (Seventh Circuit, 1954) 15

Story Parchment Co. v. Paterson P. Paper Co., 282 U. S. 555 (1931) 21

Sun Theatre Corp. v. RKO Radio Pictures, 213 F. 2d 284 (7th Circuit, 1954) 19, 20

United States v. Haley, 371 U. S. 18 (1962) 25
United States v. Parke, Davis & Co., 365 U. S. 125, (1961) 25
Wagner v. Fawcett Publications, 307 F. 2d 409 (Seventh Circuit, 1962) 10
Zenith Radio Corporation v. Hazeltine Research, 23 L. Ed. 2d 129 .....5, 6, 8, 11, 14, 22

Statutes and Rules.

15 U. S. C. §§ 1 and 2 4
15 U. S. C. § 4 4
15 U. S. C. § 5(b) 2, 4, 7, 18, 19
15 U. S. C. § 16 4
28 U. S. C. § 1254(1), 62 Stat. 928 ..... 2, 4
Fed. R. Civ. Proc., Rule 7, 28 U. S. C. 19
Fed. R. Civ. Proc., Rule 12(h), 28 U. S. C..... 2, 4
Fed. R. Civ. Proc., Rule 15(b), 28 U. S. C. 18
Fed. R. Civ. Proc., Rule 15(c), 28 U. S. C. 18
Fed. R. Civ. Proc., Rule 52(a) 4

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HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Zenith Radio Corporation, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered October 27, 1969 in this cause.

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unpublished, but is printed in Appendix A, *infra*, pp. A1-A8. The Opinion of this Court is reported in 395 U. S. 100.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1969 and its mandate stayed on November 6, 1969, Appendix A, *infra*, pp. A9-A10. The jurisdiction

of this Court is invoked pursuant to 62 Stat. 928, 28 U. S. C. 1254(1).

The relief here sought is a determination of whether or not the Court below has disregarded the mandate of this Court and in effect reversed the decision of this Court by vacating the judgment of the District Court awarding damages to Petitioner, Zenith Radio Corporation, for violation of the antitrust laws by Hazeltine Research, Inc. and the Canadian Patent Pool.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Court below had jurisdiction under this Court's mandate which was limited to "further proceedings consistent with this opinion" to construe such mandate as remanding the issue of damages to the Court of Appeals "to consider the effect of HRI's affirmative release and statute of limitations defenses on the award."

2. Whether the Court below rendered a decision in conflict with the decision of this Court in holding that HRI's release and statute of limitations affirmative defenses justified vacating the damage award and judgment of the District Court in the amount of $6,297,391 before trebling entered on April 5, 1965.

3. Whether the Court below in determining that the affirmative defenses of release and statute of limitations had not been waived under Rule 12(h) of the Federal Rules of Civil Procedure and that the trial court had not held them waived pursuant to said Rule was in conflict with the decision of this Court in the instant case.

4. Whether the court below in determining that Petitioner was not entitled to argue that the statute of limitations had in all events been tolled under Section 5(b) of the Clayton Act during the pendency of *United States* v. *General Electric, et al.*, (Civil Action No. 140-157, S. D.

N. Y.) from November 28, 1958 to November 1, 1963 was in conflict with applicable decisions of this Court and in conflict with decisions of the Court of Appeals for the Eighth Circuit (*Hardy Salt Co.* v. *State of Illinois*, 377 F. 2d 768) and of the Court of Appeals for the Third Circuit (*State of New Jersey* v. *Morton Salt Company*, 387 F. 2d 94) in view of the fact that Hazeltine was named as a co-conspirator in the government action against General Electric Company.

5. Whether the court below had jurisdiction under this Court's mandate to vacate the District Court's award of $6,297,391 and grant a new trial of the damage award.

6. Whether the court below in attempting to limit petitioner's recovery on a new trial to the damage period starting June 5, 1959 and to limit petitioner's damages to those flowing from the June 5th, 1959 injury was in conflict with the decisions of this Court on treble damage recovery in this and other cases.

7. Whether the court below had jurisdiction, or was in conflict with the decision of this Court in the instant case, in determining what injury occasioned by acts prior to the damage period can be used in a new trial to offset petitioner's damage proofs, in the face of this Court's holding that "the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period" and that "it is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proof of compensable injury under § 4."

8. Whether the Court below was in conflict with the decisions of this Court in reserving for future determination the question of whether a treble damage award which

is based on proofs held legally sufficient by this Court is or is not excessive.

9. Whether the statute of limitations under Section 5(b) of the Clayton Act was tolled during the pendency of *United States* v. *General Electric, et al.,* (Civil Action No. 140-157, S. D. N. Y.) in which government proceeding Hazeltine was named as a co-conspirator in the same conspiracy asserted in the instant case.

STATUTES AND RULES INVOLVED.

The statutory provisions and Rules involved are 62 Stat. 928, 28 U. S. C. 1254(1); Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2; Sections 4, 5(b) and 16 of the Clayton Act and Rule 12(h) and Rule 52(a) of the Federal Rules of Civil Procedure. The foregoing statutes and rules are printed in Appendix B, *infra*, pp. A11-A14.

STATEMENT OF THE CASE.

In November, 1959 Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television field, brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents. On May 22, 1963 Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act resulting from misuse of HRI patents, including the one in suit, and a conspiracy among HRI, Hazeltine and patent pools in Canada, England and Australia. Zenith contended that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and television sets into these foreign markets.

The District Court, sitting without a jury, ruled for Zenith in the infringement action. On the counterclaim, HRI and Hazeltine—the parent company—were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English and Australian markets. The District Court held Zenith was entitled to $35,000,000 in trebled damages. The court below reversed that judgment on the ground that no fact of damage had been proved (388 F. 2d 25 (7th Cir., 1968)).

This Court granted certiorari (391 U. S. 933) to consider, among other things, whether the Court of Appeals properly discharged its function under Rule 52(a) of the Federal Rules of Civil Procedure which specifies that the findings of fact made by a district court sitting without a jury are not to be set aside unless clearly erroneous.

This Court affirmed the lower court so far as the treble damage judgments involved the English and Australian pools. But, so far as the Canadian pool was concerned, it held the court below "was clearly in error." This Court said in *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. at pp. 118-9:

> "This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pools' campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

How much that share was lessened was demonstrated by proofs in the record described by this Court as follows (395 U. S. at p. 116):

> "Damages were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television market on May 22, 1959, and throughout the damage period rather than its actual 3% share."

This Court then said (395 U. S. at p. 119):

> "We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period . . . HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time, Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

This Court then reversed the court below on the Canadian damage issue and remanded the case on the misuse injunction issue for further proceedings "consistent with this opinion" (395 U. S. at p. 141).

On remand to the Court of Appeals, Zenith filed a motion asking that Walter J. Cummings, Circuit Judge, recuse himself on the ground that said Judge had been the attorney for Western Electric Company, a subsidiary of American Telephone & Telegraph Company and a member of the Canadian patent pool. The motion recited that at the time said company executed the release in the RCA case, which HRI relies on to release it from acts of its co-conspirators, the said Walter J. Cummings was engaged as an attorney in defending Western Electric Company, which company HRI now claims to have been its co-conspirator in the Canadian patent pool. The record in *Zenith Radio Corp.* v. *Hazeltine Research* (Pl. Ex. 43, A. 2751), discloses Judge Cummings' signature on the stipula-

tion dismissing the case and shows that the said Judge was then attorney of record for the Western Electric Company, a defendant in the case. A copy of Zenith's motion is set forth as Appendix C, *infra,* pages A15-18.

Zenith's motion that Judge Cummings recuse himself was forthwith denied and in further proceedings on remand Zenith was forced to argue the issues presented before the Judge who had appeared as an antagonist to Zenith and had opposed each and every contention made by Zenith in the RCA case, which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business prior to October, 1957 at the time the RCA case was settled.

On remand, the Court below undertook to rehear issues disposed of by this court, express or implied, proceeded to order a hearing in the trial court of Canadian damage issues disposed of by that Court and affirmed by this Court, vacated the April 5, 1965 damage judgment and granted HRI the right to attempt to prove and to introduce evidence "to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391." No right was granted Zenith to show that the damages exceeded that amount and by footnote 3 of the opinion Zenith was denied the right to plead the tolling of the statute of limitations pursuant to Section 5(b) of the Clayton Act (A6).

This last holding is contrary to decisions in the Courts of Appeals in the Third and Eighth Circuits that the statute of limitations is tolled under Section 5(b) of the Clayton Act against a party named as a co-conspirator in a government suit involving the same conspiracy asserted in the instant case.

The Court below then proceeded to vacate the trial court's judgment of damages based on evidence which the court below itself admitted was legally sufficient to make out a *prima facie* case.

REASONS FOR GRANTING THE WRIT.

I.

THIS COURT HAS JURISDICTION BY A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE COURT BELOW WHICH ATTEMPTS TO REVERSE THIS COURT'S DECISION BY GRANTING A NEW TRIAL, A REHEARING OR REVIEW OF THE CANADIAN DAMAGE FINDINGS AND PERMITTING A NEW DEFENSE ON THE MERITS TO BE INTRODUCED AT A NEW TRIAL.

This Court in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 141, ordered that the judgment of the Court of Appeals, "is affirmed in part and reversed in part, and the case is remanded to that Court for further proceedings consistent with this opinion."

In the case of *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 (1895) this Court said:

> "When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded."
>
> "*If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court* . . . the opinion delivered by this court at the time of rendering its decree may be

> consulted to ascertain what was intended by its mandate; and either upon the application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." (Italics ours.)

Nowhere in this Court's opinion is there any direction, express or implied, directing the court below to grant a new trial on the Canadian damage issue or authorizing the court below to grant HRI a new opportunity to introduce testimony in support of its defense of the statute of limitations, aimed at excluding from recovery, damages flowing from pre-damage period acts "as well as an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391."

To reach the extraordinary conclusion that this Court expressly authorized it to take the above action, the court below had to reverse this Court on three important and controlling decisions in this case. First, the holding of this Court that the defenses of limitations and release were "belatedly raised" and therefore waived. Second, that acts showing the fact of damage outside the damage period were not barred by release or limitations; and third, that acts subsequent to May 22, 1959 were sufficient to support the damage findings.

In order to reverse this Court's statements concerning the waiver of affirmative defenses, the court below stated, without support from the record, that:

> "It is our view that the [trial] Court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery."

The Court of Appeals reaches this conclusion notwithstanding the comment of the trial judge to HRI counsel that, "You do agree that the statute of limitations can be

waived" (Court of Appeals Appendix, 2026). However, it is well settled that the trial court's decision can be supported by any ground sustained by the record, whether assigned by the trial court or not. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1938) where this Court said:

> "[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

More pertinent is this Court's holding in Footnote 13 of its opinion, as follows (395 U. S. at p. 117):

> "HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for 'leave to file' defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement . . . The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under Fed. Rule Civ. Proc. 12(h) as urged by Zenith in both the District Court and the Court of Appeals."

The court below rids itself of the waiver issue by, in effect, reversing this Court's ruling and construing the trial court's mental processes as precluding a ruling of waiver. That the waiver was final and conclusive and could not be remedied by filing the affirmative defenses a year after trial and after findings had been made is shown by the decisions of the court below. See *Roe* v. *Sears, Roebuck & Co.*, 132 F. 2d 829 (7th Cir. 1943); *Charm Tred Mills* v. *Erle P. Halliburton, Inc.*, 202 F. 2d 294 (7th Cir., 1953); *Wagner* v. *Fawcett Publications*, 307 F. 2d 409 (7th Cir., 1962).

This court described the so-called affirmative defenses as "belatedly raised" and used the words "unwaived" and "properly asserted" in the Footnote 13 of its opinion, which was a clear holding that the trial court had properly ruled that those affirmative defenses were not in the case. This Court then said in the same footnote that it need not "deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an *unwaived* statute of limitations defense is *properly asserted.*" Obviously, this Court agreed with the trial court that these defenses had been waived and not properly asserted and that therefore they were not in the case.

The court below refers to this Court's statements in its opinion that since the District Court "attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded." What the court below ignores is this Court's decision that such finding, even if true, was irrelevant in the disposition of this case.

Thus, this Court says (395 U. S. at pp. 118-9):

> "This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the Pools' campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

Certainly, this Court thereby expressly ruled that such pre-damage period conduct was not barred by limitations or release as the court below, in an attempt to reverse this Court, now holds.

Further, this Court in effect has ruled that the statute of limitations even if applicable would not run during the pendency of the instant suit and that the counterclaim would relate back to the filing of the instant suit thus making the entire limitations issue irrelevant and moot. See this Court's opinion, 395 U. S. at p. 102, footnote 2.

Finally, if pre-damage period conduct is barred from consideration with respect to the amount of damage by limitations or release, as the court below now holds, how could this Court reach the conclusion that pre-damage period conduct was competent evidence on the fact of damage issue? Obviously, if pre-damage period conduct can be considered on the fact of damage issue, it must be relevant and competent evidence as to the amount of damage. In this connection, it should be remembered that HRI argued in this Court that the evidence of damage-causing conduct occurring outside the four year damage period was barred by release and limitations and could not be considered on the fact of damage issue. (pp. 50-55 HRI main brief in this Court.) Specifically, HRI urged that this Court could not consider the evidence of (1) the July, 1958 McConnell-Kiley meeting in which Brian McConnell, the pool manager informed Zenith "that to continue business in Canada, Zenith would be required to sign CRPL's standard license which did not permit importation, and that to sell in Canada it must manufacture there."; (2) the September 1958 *Trade Builder* notice in which the pool again threatened distributors, dealers and users of unlicensed sets with infringement litigation, and (3) the May 12, 1959 McConnell-Crotty

conversation in which "the pool manager conferred with Zenith's Vice-President, informing him that Zenith was infringing pool patents and would require a license, but that licenses were granted only for local manufacture."

Similarly, HRI contended that this Court could not consider earlier pool conduct, namely, explicit refusals to grant a license for importation in 1953 and the threats of suits against Zenith's Canadian distributors and dealers in 1951 and 1954, because such acts occurred prior to the 1957 release date. (HRI main brief in this Court pp. 48-50.) This Court, however, reviewed and ruled upon this evidence and specifically referred to it and said "For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful." This Court concluded that this evidence, as well as the evidence after the release date but before the start of the statutory damage period "clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pools' campaign against imported goods had consequences lasting well into the damage period" (395 U. S. p. 118).

Obviously, if this Court believed that the defenses of release and limitations were bars to the consideration of the pre-damage period evidence, it would not have used this evidence to sustain its finding that the fact of damage had been proved. These claimed defenses either are a bar or not a bar, and if they do not bar consideration of pre-damage period conduct on the fact of damage issue, *a fortiori*, they could not bar consideration of this same evidence on the issue of damage amount. Further, the court below ignored this Court's holding which expressly ap-

proves the damage theory and measure of damages employed by the District Court in fixing petitioner's damages. This Court states at 395 U. S. pp. 124-5:

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. *The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed.*" (Italics ours.)

This Court's opinion will be searched in vain for any intimation that the Zenith damage computation in Canada was not legally or factually sufficient.

This Court in its opinion admonished the court below not to attempt to deal with questions of fact "*de novo*" and to follow the teaching and rationale of the *Bigelow* case. The Court below understands this rationale as appears conclusively from its opinion in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 566 (7th Cir., 1951), where it said:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that it was within the province of the trier of the facts to rely upon the computation there disclosed, providing, of course, there was proof of the fact of damage."

Obviously, in the face of a direct finding by this Court that the evidence shown in this record is sufficient to support the trial court's damage findings in Canada, no grant of authority by this Court to order a new trial on the issue of damages can be implied. The court below assumes that authority by its own statement that this Court remanded the Canadian damage issue "to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award." Nowhere in this Court's opinion is there any such direction.

II.

THIS COURT GRANTED NO AUTHORITY TO THE COURT BELOW TO VACATE THE APRIL 5, 1965 JUDGMENT BY GRANTING A NEW TRIAL OR TO LIMIT PETITIONER'S DAMAGE PROOFS TO DAMAGES FLOWING FROM THE JUNE 5, 1959 LETTER.

The court below without any showing that the trial court abused its discretion in denying a new trial on the Canadian damage issue, has granted a new trial, limiting the issues to be tried in such a way as to in effect destroy the petitioner's right to recover treble damages in this case.

The court below has repeatedly held that the refusal to grant a new trial is not subject to review "except under exceptional circumstances showing a clear abuse of discretion." *Stinebower* v. *Scala*, 331 F. 2d 366, 367 (7th Cir., 1954).

Recognizing that the record shows no abuse of discretion on the part of the trial court, HRI counsel now say in their brief in opposition to Zenith's petition for a writ of mandamus, p. 31:

> "Thus, this case does not involve questions concerning abuse of discretion or of 'newly discovered evidence' but rather an erroneous ruling of law by the

> trial court, which, when corrected by the Court of Appeals required further hearings on the amount of damages."

However, the opinion of the court below was not limited to statute of limitations or release or any other question of law but was an unlimited new trial as shown by the following statement of the court below that HRI was to be given "an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391."

This obviously was a new trial on the damage issue granted HRI alone without justification from this Court's mandate and with no showing of any abuse of discretion by the trial court. The new trial ordered by the court below raises the question of law whether petitioner's damages can be limited to those shown to be the result of each particular overt act during the damage period. This was an obvious attempt to reverse the decision of this Court in *Bigelow* which permitted proof of damages by comparing earnings in defendants' theatres with those of petitioners. The rule applied by the court below would have completely precluded petitioner's damage proofs in *Bigelow*. If allowed to stand, every decision on treble damage rendered by this Court is no longer the law in the Seventh Circuit.

This Court, in the hearing on certiorari, had the entire case before it and the issue of whether or not the trial court properly denied the HRI motion to re-open the Canadian damage issue was before this Court. Counsel for HRI now concede that only a question of law was involved and this Court did not in any way disturb the trial court's decision.

In the case of *In Re Potts*, 166 U. S. 263, 267 (1897), this Court said:

> "When the merits of a case have been once decided by this court on appeal, the circuit court has no au-

thority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer."

The court below has done all of these things with no leave from this Court, either express or implied.

Further, the court below has imposed conditions on a new trial which would completely reverse this Court's decision with respect to the damage issues. Thus the Court holds that petitioner cannot rely on damage causing acts prior to the damage period the cumulative effects of which this Court held "interfered with and made more difficult the distribution of Zenith's products in 1959 and later years". The opinion of the Court of Appeals apparently also would limit recovery of damages during the damage period to those flowing from the June 5, 1959 letter, or to dollar amounts ascribable to individual "overt" acts. These conditions if permitted to stand would destroy not only petitioner's damage claim but if such conditions can be interpolated into the Act the trial of a treble damage claim under the antitrust laws is impossible in the Seventh Circuit.

In its opinion in the instant case, this Court said, "The purpose of giving private parties treble damages and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws" (395 U. S. at pp. 130-1). We submit that the rulings of the court below reversing this Court's decisions and imposing conditions upon a treble damage suit not permitted by the Act is a matter of grave public concern which must be remedied by this Court if the purposes of that Act are to be preserved in the Seventh Circuit.

III.

SINCE THE GOVERNMENT SUIT AGAINST GENERAL ELECTRIC NAMED HAZELTINE AS A CO-CONSPIRATOR THE HOLDING OF THE COURT BELOW THAT THE STATUTE OF LIMITATIONS COULD NOT BE TOLLED PRESENTS NOT ONLY A QUESTION OF GREAT PUBLIC IMPORTANCE IN THE ENFORCEMENT OF THE ANTITRUST LAWS BUT A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL.

This Court in its opinion in the instant case said:

> "The purpose of giving private parties treble damages and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws." (395 U. S. at pp. 130-1.)

Obviously, a decision circumscribing a treble damage recovery by an erroneous interpretation of the provisions of Section 5(b) of the antitrust laws is a matter of public concern deserving of remedy by this Court.

For example, the defenses of limitations and release were raised for the first time one year after trial, and after the trial court had entered findings of fact and conclusions of law. The only claimed justification for the delay was a fabricated claim that Zenith had changed its legal theory to the surprise and prejudice of the HRI counsel (A. 2943). The trial court recognized the entire contention as a fraud (A. 3033, 3036-8, 3040; Court of Appeals Appendix, A. 1865, 1870, 1934, 1950, 1953). While the trial court permitted these defenses to be filed "for the sake of the record" in support of HRI's post trial motion to dismiss the counterclaim (A. 3036), this did not amount to an amendment of the answer to the counterclaim under Fed. Rule Civ. Proc. 15(b) and (c), and as we have shown before, did not remedy the waiver of those defenses. If the disposition of the case by the court below is allowed to

stand Zenith must start all over again on an irrelevant and discredited legal issue ten years after the case was started just as if this case had never been before this Court at all.

Further, the ruling of the court below would not only permit HRI to litigate waived and meritless defenses, but at the same time would deny Zenith the benefit of tolling of the statute of limitations, thus destroying petitioner's rights as a litigant. Zenith certainly was entitled to contend that under § 5(b) of the Clayton Act, the suit was tolled during the pendency of *United States* v. *General Electric, et al.*, from November 24, 1958 to November 1, 1963, thereby extending the permissible recovery period back to 1954 and making all of the contentions about acts being barred by the statute of limitations academic and irrelevant.

However, the court below says the point is not before it because Zenith "did not raise this point in a reply to HRI's affirmative defense." Obviously, Zenith was not required to "plead" the effect of tolling as a reply to HRI's "belatedly raised" limitations defense. Fed. Rule Civ. Proc. Rule 7 expressly provides that such a pleading is unnecessary and shall not be allowed except where ordered by the Court.

Moreover, the further statement of the court below that "in any event the law of this circuit is that the tolling of the limitations protects the plaintiff in a private antitrust suit only with respect to a party defendant in a government suit. *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 292 (7th Cir., 1954)," results in a direct conflict with the decisions of this Court and with Courts of Appeals in other Circuits.

The *Sun Theatre* case was decided before § 5 of the Clayton Act was amended by the Congress in 1955. After the amendment of the statute, two cases in other Circuits

squarely held that the statute of limitations as to named co-conspirators in the government action is tolled, *Hardy Salt Co.* v. *State of Illinois,* 377 F. 2d 768 (8th Cir., 1967) and *State of New Jersey* v. *Morton Salt Company,* 387 F. 2d 94 (3rd Cir., 1967). Hazeltine was a named co-conspirator in the government action against General Electric *et al.*

The construction adopted in the 1954 *Sun Theatre* case that tolling only occurred when a judgment or decree in a government action would have estoppel effect was expressly rejected by this Court in *Minnesota Mining* v. *New Jersey Wood F. Co.,* 381 U. S. 311 (1965) and *Leh* v. *General Petroleum Corp.,* 382 U. S. 54 (1965).

IV.

THERE IS NO PROVISION IN THE FEDERAL ANTITRUST LAWS LIMITING PETITIONER'S RECOVERY TO INDIVIDUAL ACTS THUS EXCLUDING DAMAGE PROOFS COMPARING A BUSINESS RESULT IN AN OPEN MARKET WITH AN ILLEGALLY RESTRICTED MARKET.

The court below next proceeds to reverse this Court by stating "The record establishes that on June 5, 1959 the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the predamage period. Accordingly, Zenith claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5th injury." This holding apparently attempts to limit Zenith's damages to the damages it suffered as a result of the June 5 injury. If this is so, it is an attempt to reverse the decision of this Court set forth in its opinion as follows (395 U. S. at pp. 124-5):

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States dictated it should have obtained in Canada."

Obviously, this damage found by this Court is not limited to one item of damage flowing solely from the letter of June 5, 1959.

The court below next states that the damage proofs upon which the amount of damages could be computed, while competent evidence, were only "prima facie" and that therefore it still had before it an issue as to "excessiveness of the award." This, of course, is an interpolation into the Act and is not permitted under any of the decisions of this Court on the subject of damages in any antitrust case.

This Court in *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U. S. 555 (1931) disposed of any contention such as made by the court below that it is still free to set aside a judgment supported by competent evidence on the ground that the court below may think it was excessive. There the Court said at p. 562:

> "It is true that there was uncertainty as to extent of the damage, but there was none as to the fact of damage . . .The rule which precludes the recovery of uncertain damage applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount."

See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927).

Further such a reservation by the Court below is utterly inconsistent with this Court's statement in its opinion that: "The authority of an appellate court, when reviewing the

findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence" (395 U. S. at p. 123).

In the instant case the court below has vacated the judgment which it conceded was based on evidence upon which the amount of damage could be reasonably computed by virtue of this Court's decision in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946).

In the trial court, HRI was free to offer proof rebutting petitioner's competent evidence of damage. It took no exception to Zenith's proofs and filed no countervailing evidence or proofs at the trial *and made no showing of any newly discovered evidence* in the post-trial proceedings. After the case had been before this Court and the findings of damage had been approved here, the court below now considers it has authority to grant a new trial on an irrelevant issue, namely, whether or not evidence of damage flowing from pre-damage period acts was mixed into the damage award, notwithstanding this Court's express finding that "the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period" (395 U. S. at p. 119) and this Court's holding that "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4" (395 U. S. at p. 114, footnote 9).

Further, the issue is irrelevant and expressly so held in this Court's present opinion wherein it says that the thrust of this defense was primarily that "the findings as to Canada had erroneously included damages resulting from the conduct occurring prior to May 22, 1959" (395 U. S. at p. 117, footnote 13). Obviously if such a thrust had merit it was as much a defense to the fact of damage as to the

amount. This Court, however, sustained the trial court's findings whether based on pre-damage period conduct or damage period conduct irrespective of any statute of limitations or release defense. Surely the court below had no authority to reverse this Court by vacating the treble damage award and granting a new trial limited to damage period evidence, and thus, in effect destroying this Court's opinion on the damage issues in this case.

It also appears from this Court's opinion in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 263, 265 that whether or not damages flowing from pre-damage period acts are mixed in with damage period acts is irrelevant. Thus, this Court says:

> "And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trademark in a single product to which the defendant has contributed other elements of value or utility and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendants' profits where his own wrongful action has made it impossible for the plaintiff to show in what proportion defendant had contributed to the profits."

This Court also said in the same case (327 U. S. at 265):

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights."

V.

SINCE THIS COURT REFUSED TO REMAND THE ISSUE OF A NEW TRIAL THE COURT BELOW HAD NO JURISDICTION TO GRANT A NEW TRIAL ON THE CANADIAN DAMAGE ISSUE.

At p. 145 of the HRI brief in this Court, it was contended that this Court should remand the case to the court below for a determination of other issues which included the issue of whether the trial court erred in refusing to grant a new trial. In answer, Zenith argued before this Court at pp. 50-53 of its reply brief that there was no abuse of discretion by the trial court and therefore under applicable law there was no jurisdiction in the court below to review such denial or to grant a new trial.

We pointed out that under the decision of this Court in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580 (1911) that "as the case is here upon certiorari to review the judgment of the circuit court of appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done." Since this Court did not disturb the trial court's denial of a new trial and did not remand the issue, and certainly did not direct a new trial, the court below had no jurisdiction to do so.

Finally, without exception this Court has held the lower courts bound to accept the decision of this Court on the matters which have been before it. At pp. 147-149 of the HRI main brief in this court the amount of petitioner's damages was argued at length. That argument was answered at pp. 50-55 of petitioner's reply brief under the heading "There was no merit in Hazeltine's post trial motions and they were properly denied by the trial court." Here, the opinion of this Court has found the trial court's

damage findings supported by the record evidence and has refused to disturb them on any ground urged. That disposition is binding on the court below. See *United States* v. *Haley*, 371 U. S. 18 (1962); *United States* v. *Parke, Davis & Co.*, 365 U. S. 125 (1961); *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948).

In *Perkins* v. *Standard Oil Co.*, 23 L. Ed. 2d 599, 608 (1969), the Court of Appeals vacated a judgment for a treble damage plaintiff. This Court reversed that decision, stating:

> "We therefore see no need to prolong this litigation which began nearly ten years ago. The jury's verdict and judgment should be reinstated."

CONCLUSION.

WHEREFORE, Zenith asks that a writ of certiorari issue to review the judgment of the Court below and that on such review the Judgment entered by the District Court on April 5, 1965 be reinstated.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1969 — September Session, 1969

Nos. 15246, 15563

HAZELTINE RESEARCH, INC., *Plaintiff and Counter-Defendant, Appellant,*

vs.

ZENITH RADIO CORPORATION, *Defendant and Counter-Claimant, Appellee.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 27, 1969

Before CASTLE, *Chief Judge*, KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* This court, on December 19, 1967, filed its decision, 388 F. 2d 25 (7th Cir. 1967), in the above causes and, so far as pertinent now, affirmed the judgment awarding $150,000, treble damages, to Zenith Radio Corporation for misuse by Hazeltine Research, Inc. (HRI) of its domestic patents, but struck paragraph A of the related injunction, issued to restrain HRI from imposing unlawful conditions on those patents. We reversed the judgment in Zenith's favor for $38,000,000, treble dam-

ages, based on HRI's unlawful participation in the Canadian, English and Australian patents pools, and *ipso facto* set aside an injunction restraining HRI's further unlawful antitrust activity in these foreign patent pools.

On appeal to the Supreme Court, the treble damage award with respect to the domestic patents was not challenged. The Court, 395 U. S. 100 (1968), reversed our decision striking paragraph A of the injunction and remanded that part to this court for further consideration. *The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award.* In addition, the Court reinstated the related injunction which this court had set aside with that treble damage judgment for Zenith.[1] The Supreme Court reversed our decision with respect *to the Canadian patent pool because it concluded we erred in our determination that Zenith had failed to prove the "fact" of damage in Canada.*

After the Supreme Court mandate was filed in this court, we gave leave to HRI and Zenith to file supplemental authorities. Zenith thereupon "abandon[ed] its request" originally made in this court to reinstate paragraph A which this court had struck. The following questions are before us: (1) whether Zenith's injury during the statutory damage period resulted to any extent from HRI's conduct preceding that period and, if so, what effect releases given by Zenith in 1957 had on Zenith's recovery; (2) what effect the statute of limitations had

1. The Supreme Court affirmed this court's decision vacating judgments in Zenith's favor against Hazeltine Corporation. It affirmed our decision with respect to setting aside the treble damage judgment so far as it was based on the patent pool activities in England and Australia.

on HRI's liability; and (3) whether the award of damages was excessive. *These points had been raised before us by HRI in the first appeal, but we saw no need of passing on them in view of our reversal of the judgment for Zenith.*

We have examined the issues now before us in the light of the Supreme Court opinion and the supplemental authorities cited to us. We vacate the judgment for Zenith with respect to the Canadian pool in the amount of $6,297,391, trebled, and remand for further proceedings with respect to the award of damages.

THE AFFIRMATIVE DEFENSES.

After the evidence at the trial was closed HRI moved for leave to file the affirmative defenses in bar of Zenith's recovery. *Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived.* The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool *was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under Fed. R. Civ. P. 12(h). 395 U. S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery.* We turn therefore to consideration of the correctness of the district court's ruling.

The relevant four year damage period was measured from May 22, 1963, when Zenith filed its counterclaim.[2] The cutoff date therefore was May 22, 1959. HRI relies

2. See 395 U. S. 100, 108 (1968). 15 U. S. C. § 15b reads:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

upon releases given September 27, 1957, by Zenith to RCA, General Electric, and Western Electric in settlement of Zenith's counterclaim in the case of *RCA* v. *The Rauland Corp. and Zenith Radio Corp.*, No. 48 C 1818 (N. D. Ill. 1957), in contending that Zenith's claim is now barred.

The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said "[t]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period." 395 U. S. 100, 116 (1968). Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency, and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded.

Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre*, 351 F. 2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U. S. 1011 (1966); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. 2d 5 (3r Cir. 1957). Our inquiry therefore is narrowed to the question of the effect of the statute of limitations on Zenith's right of recovery for post-release misconduct.

It is "well settled . . . that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff." *Nalle* v. *Oyster*, 230 U. S. 165, 182 (1913). Consequently, in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action. The law with respect to the statute of limitations in Sec. 15b of the Clayton Act is that the period commences to run from the last overt act of the conspiracy. *Crummer Co.* v. *DuPont*, 223 F. 2d 238, 247-48 (5th Cir.), *cert. denied*, 350 U. S. 848 (1955); *Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, 1007 (D. Mass. 1942), *aff'd* 172 F. 2d 37, 47 (1948); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190, 194 (9th Cir. 1956); *Century Hardware Corp.* v. *Powernail Co.*, 282 F. Supp. 223, 227 (E. D. Wis. 1968). In *Century Hardware*, the district court construed this court's decisions in *Emich Motor Co.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), and *Baldwin* v. *Loew's, Inc.*, 312 F. 2d 387 (7th Cir. 1963), as stating the law of this Circuit to be in accordance with the foregoing decisions.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) (supplemental opinion at 793-95), the following rule was applied:

> [W]here the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and change occurred outside the statutory period does not affect the plaintiff's right to recover for the separative invasion of its rights which occurred within the period.

The rule as applied in that case was approved by the Supreme Court on appeal of the *Hanover* case. See 392 U. S. 481, 502 n. 15 (1968). Thus, even though Zenith may have had a cause of action for overt acts of the conspiracy prior to May 22, 1959—the beginning of the damage period—

the fact that it did not then file suit does not preclude its present suit for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-period acts occurring in the damage period.

HRI conceded at trial that the Canadian pools existed into the damage period. The record establishes that on June 5, 1959, the Canadian pool wrote Zenith claiming that it was infringing pool patents by its distribution of American-made televisions and radios in Canada. This act was substantially similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damages suffered only in the statutory period, is entitled to recover for the damages it suffered as a result of the June 5 injury.[3]

We conclude therefore that the district court's denial of *the motion to bar Zenith's recovery completely on the ground of the releases and the running of the statute of limitations was not erroneous.*

Excessiveness of the Award.

We think this issue is not now ripe for decision because HRI had no opportunity, after the district court permitted filing of HRI's affirmative defenses, to introduce evidence relevant to the affirmative defenses. We vacate the district court's award of $6,297,371—trebled to $18,892,173—and remand for further proceedings.

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3. Zenith argued in its original brief that the statute of limitations was tolled by reason of Sec. 5(b) of the Clayton Act during the pendency of *United States* v. *General Electric, et al.* in the Southern District of New York from November 28, 1958 to November 1, 1963. At the trial Zenith did not raise this point in a reply to HRI's affirmative defense, so that, strictly speaking, the point is not properly before us. However, in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in the government suit. *Sun Theatre Corp.* v. *RKO Radio Pictures*, 213 F. 2d 284, 292 (7th Cir. 1954). HRI was not a party defendant in that suit, although named as co-conspirator.

The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor. There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, *it would have enjoyed the same proportion of that market as it did in the United States market.* In Canada its principal competitors were counterparts of its principal competitors in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. *It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946).

The district court in permitting the filing of HRI's affirmative defenses of release and statute of limitations—as an amendment to HRI's defense to Zenith's counterclaim —*made it plain in doing so that the court would make no change in its findings and* conclusions with respect to *damage in the Canadian market.* However, we refer again to the statement of the Supreme Court that "[s]ome part of the damages awarded . . . *necessarily resulted from pre-damage period conduct.*" 395 U. S. 100, 116-17. The Court noted that although the damage award was confined to the damage period, the trial court apparently deemed it immaterial whether the "damage-causing" acts occurred before or after the start of the damage period.

Earlier in this opinion we held that the releases only barred Zenith's recovery of damages caused by injuries

inflicted prior to the date of the releases; that the damage period commenced to run from the last overt act of the conspiracy; and that the statute of limitations did not bar recovery of damages *caused by "damage-causing" acts within the period.* Accordingly, we think that HRI should have—what it was not given at the trial—an opportunity to introduce testimony, in support of its defense of statute of limitations, aimed at excluding from recovery damages flowing from pre-period "damage-causing" acts, as well as *an opportunity to introduce evidence to show that Zenith's damage flowing from "damage-causing" acts within the period did not amount to $6,297,391.*

The judgment for $6,297,391 — before trebling — is vacated and the cause is remanded for further proceedings consistent with the views expressed in this opinion. (Italics ours.)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Monday, October 27, 1969.

Before

Hon. Latham Castle, Chief Judge.

Hon. Roger J. Kiley, Circuit Judge.

Hon. Walter J. Cummings, Circuit Judge.

No. 15246, 15563

HAZELTINE RESEARCH, INC., *Plaintiff and Counter-Defendant-Appellant,*

vs.

ZENITH RADIO CORPORATION, *Defendant and Counter-Claimant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, subsequent to the remandment to this Court by the Supreme Court of the United States for further proceedings in conformity with the opinion of said Court.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court for $6,297,391—before trebling—in this cause appealed

from be, and the same is hereby, VACATED, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court filed this day.

It is further ordered and adjudged that the costs of these appeals in this Court be divided equally between the parties.

APPENDIX B.

28 U. S. C. § 1254 (1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

15 U. S. C. § 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make unlawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between pro-

ducers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

15 U. S. C. § 26.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties,

against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

15 U. S. C. § 16(b).

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Fed. Rules Civ. Proc., rule 12 (h), 28 U. S. C.

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings, or at the trial on the merits, and except (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received. (As amended Jan. 21, 1963, effective July 1, 1963 and in force at the time pertinent to this cause.)

Fed. Rules Civ. Proc., rule 52 (a), 28 U. S. C.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

HAZELTINE RESEARCH, INC., *Appellant,* *vs.* ZENITH RADIO CORPORATION, *Appellee.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 15246 No. 15563

MOTION TO DISQUALIFY JUDGE WALTER J. CUMMINGS, JR. FROM FURTHER PARTICIPATION IN ANY HEARING IN THIS COURT IN THIS CASE.

Now comes Zenith Radio Corporation, Appellee herein, by Thomas C. McConnell, its counsel and asks that Judge Walter J. Cummings, Jr. disqualify himself from any further participation in this case and for cause shows:

(1) That one of the issues sought to be raised by Hazeltine Research, Inc., Appellant, in further hearings in this cause is the effect of a certain release executed with others by Western Electric Co., a subsidiary of American Telephone and Telegraph Company, the appellant claiming that such release acts to release Hazeltine Research, Inc. as a conspirator with the Western Electric Company from

liability from acts occurring prior to the execution of such release. That in making this contention, Hazeltine Research, Inc. is compelled to and does allege that it was a co-conspirator with the Western Electric Company in the conspiracy which the Supreme Court of the United States has now held to be an illegal conspiracy violating Sections 1 and 2 of the Sherman Act.

(2) That at the time the said release was executed, Judge Walter J. Cummings, Jr. was attorney for the Western Electric Company and was actively engaged in defending that company now claimed to be the appellant's co-conspirator and was appearing continuously in court and making arguments in defense of his client's position that the conspiracy was legal under the antitrust laws. That one of the issues sought to be re-asserted here by Hazeltine Research, Inc. is the legality of the selfsame conspiracy held illegal by the Supreme Court.

(3) That the record in this case at p. 2129 of the Appendix, being plaintiff's exhibit No. 43 and as shown by the signature of Judge Cummings on appellee's exhibit No. 43 (A2129) shows that said Judge was then attorney of record for the Western Electric Company and signed the stipulation dismissing the cause of Zenith's counterclaim on behalf of Western Electric and therefore consummated a settlement of the cause for a consideration of some $10,000,000.

(4) That at the time of the said settlement and at the time the counterclaim was dismissed pursuant to the stipulation, the said Walter J. Cummings, Jr. told Thomas C. McConnell, then and now attorney for Zenith Radio Corporation, that he, Cummings, as its lawyer, had advised the Western Electric Company, a subsidiary of the telephone company, not to make a settlement because in his opinion Zenith could not prove its damages. That this is exactly

the position which was taken by this Court in the above-entitled cause in the hearing of which Judge Cummings was a member of the panel and which panel held that Zenith had shown no "fact of damage," that opinion being now reversed by the Supreme Court of the United States.

(5) That the fact that Judge Cummings participated as attorney, actively engaged in the litigation and not a mere attorney of record is shown by the transcripts of the proceedings which were filed as a part of the record in the United States District Court in Cause No. 48 C 1818 and of which Zenith has copies and can produce them for the inspection of this Court if the Court so requests.

(6) That since the same issues raised in that case are being raised here by Hazeltine Research, Inc., a co-conspirator with the Western Electric Company, Zenith may be forced to argue issues before a judge who appeared in an antagonistic position to Zenith and its attorneys and opposed each and every contention made by Zenith in that case which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business at an earlier period than here involved.

(7) That the reason Judge Cummings was not requested to disqualify himself at the time this case was originally heard was that Zenith's counsel had no knowledge, prior to the actual appearance on the bench of Judge Cummings, that he was going to participate as a judge in the case. That Zenith's counsel was present, prepared to argue the case and had no opportunity of consulting with his client so that he might have authority to make a motion of the kind and character presented here; that in view of the facts here presented Judge Cummings has the legal and ethical duty to recuse himself regardless of whether Zenith or its counsel makes a motion to that effect.

WHEREFORE, in the interests of justice and pursuant to the

principles set forth in *Roberson* v. *United States,* 249 F. 2d 737 at p. 741 a situation is presented "under which a judge should have disqualified himself" and therefore appellee Zenith Radio Corporation requests that Judge Walter J. Cummings, Jr. now disqualify himself from any further participation in this case.

ZENITH RADIO CORPORATION,
Appellee,
By THOMAS C. MCCONNELL,
Its Attorney.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Thomas C. McConnell, being duly sworn on oath says that he has read and subscribed to the foregoing motion and that the facts therein stated are true.

THOMAS C. MCCONNELL.

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid this 20th day of June, 1969.

STEPHANIE A. CHODERA,
Notary Public.